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B. Chubb
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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

FILE: B-185724

DATE: December 8, 1975

MATTER OF: E-Systems, Inc.

DIGEST:

1. Although protest filed after closing date for receipt of initial proposals against whether award was in compliance with the statutory requirements of Brooks Act and implementing regulations is untimely under Bid Protest Procedures since protester knew or should have known basis for protest prior to closing date for receipt of initial proposals, protest will be considered since it raises issues significant to procurement practices in that allegation is based in part on congressional intent.
2. Protest which questions propriety of General Services Administration's (GSA) delegation of authority to Department of Commerce (DOC) to purchase off-the-shelf minicomputers as well as failure of GSA Administrator to make determination of economy and efficiency prior to delegation is denied since we have consistently recognized that, under the Brooks Act, GSA can delegate authority upon a finding of necessity or desirability to allow for orderly implementation of program for utilization of automatic data processing equipment (ADPE). Agency is entitled to rely on authorizations given by GSA to proceed with ADPE procurement after solicitation has been reviewed.
3. Allegation that minicomputer offered by subcontractor to successful proposer is not compatible with hardware specifications of RFP is not supported where both analysis by agency and GAO ADPE staff of successful proposal shows compatibility with specifications. Allegation that subcontractor is to be substituted for failure to deliver, without more information, would not substantiate protest. In any event, this pertains to matter of contract administration which is function and responsibility of contracting agency.
4. Contentions that DOC conducted negotiations with eventual contractor while not affording opportunity to other offerors will not be considered on merits since issue has been decided by U.S. District Court in suit instituted by one of those other offerors. Even though protester was not

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party to suit, it is GAO policy not to rule on protest where matter involved is subject of litigation.

On April 14, 1975, the Department of Commerce (DOC) issued negotiated solicitation No. 5-35243 for Automation of Field Operations and Services (AFOS) systems for the National Weather Service (NWS) to provide individual NWS facilities with high speed data analysis capabilities through the use of on-site minicomputers linked together in a centralized national system.

Due to the inclusion of a minicomputer in the AFOS system, DOC was required by 40 U.S.C. § 759 (1970), Public Law 89-306 (Brooks Act), to obtain a delegation of procurement authority (DPA) from the General Services Administration (GSA). Accordingly, on January 22, 1975, DOC requested a DPA. By letter dated March 21, 1975, a DPA was granted to DOC by GSA for a fully competitive procurement after a review of the solicitation. The DPA was released on April 2, 1975, and shortly thereafter the solicitation was issued.

The closing date for submission of proposals was July 7, 1975, and six firms including E-Systems, Inc. (E-Systems), and Aeronutronic Ford Corporation (AFC) submitted proposals. By letter dated September 18, 1975, best and final offers were requested to be submitted by October 14, 1975. Five firms submitted best and final offers and these were evaluated by a source evaluation board. On January 30, 1976, award was made to AFC.

By telegram dated January 14, 1976, and received in our Office on January 15, 1976, E-Systems protested an award to any other offeror on the following bases: (1) since the procurement includes the purchase of automated data processing equipment (ADPE), the Brooks Act requires that the purchase be made by GSA and, therefore, the procurement violates the Brooks Act and congressional intent; (2) AFC has proposed to develop and build a new minicomputer although the solicitation contemplates the use of off-the-shelf equipment; and (3) DOC conducted negotiations with AFC in December 1975, while not affording this opportunity to other offerors within the competitive range.

DOC, in a report to our Office dated February 25, 1976, takes the position that it did not violate the Brooks Act and in

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any event this basis for protest is untimely since E-Systems actively participated in all preaward activities, i.e., attended the preproposal conference, and submitted initial and best and final offers. DOC states that E-Systems' belief that AFC has proposed to develop and build a new minicomputer is incorrect. Lastly, DOC did not conduct negotiations with AFC in December 1975, but a meeting was held to clarify AFC's reduction in cost for maintenance manuals in the best and final offer.

By letter dated March 23, 1976, E-Systems submitted comments responsive to the DOC report and set forth the protest issues to be resolved as follows: whether (1) the award was in compliance with the statutory requirements of the Brooks Act and implementing regulations; (a) the automatic data processing equipment requirements of the AFOS computer subsystem are delegable by GSA under 40 U.S.C. § 759; (b) a finding of economy and efficiency must be made by the Administrator of GSA under 40 U.S.C. § 759; (c) an improper delegation of procurement authority can be waived by E-Systems' participation in preaward activities; (2) AFC's minicomputer, the Xerox IDS-16, satisfies the hardware requirements of the solicitation; (3) conversion of Data General's (protester's subcontractor) NOVA 840 software instructions requires infringement of Data General's proprietary rights (This aspect of the protest has been withdrawn by letter dated July 13, 1976, from counsel in view of our decision Data General Corporation, B-185897, April 28, 1976, 76-1 CPD 287); and (4) a preaward communication of December 18, 1975, between DOC and AFC constituted negotiations.

It is DOC's contention that E-Systems' protest based on violation of the Brooks Act is untimely and, therefore, not for consideration on the merits.

Section 20.2(b)(1) of our Bid Protest Procedures, 4 C.F.R. part 20 (1976), provides that protests based upon alleged improprieties in any type of solicitation which are apparent prior to the closing date for receipt of initial proposals shall be filed prior to the closing date for receipt of initial proposals. It seems clear that E-Systems knew or should have known that this procurement had a DPA since the AFOS system contained numerous computers and in order for DOC to be the procuring activity, authority must have been granted by GSA pursuant to the Brooks Act

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to buy the equipment needed. E-Systems should have protested points (1)(a) and (b) prior to July 7, 1975, the date for receipt of initial proposals. However, the protest was not received in our Office until January 14, 1976. Therefore, that portion of the protest is untimely.

Section 20.2(c) of our Bid Protest Procedures, however, provides that the Comptroller General, for good cause shown, or where he determines that a protest raises issues significant to procurement practices or procedures, may consider any protest which is not filed timely. Since the protest was based in part on congressional intent as it pertains to the Brooks Act, the protest raises a significant issue. LTV Aerosp. Corporation, 55 Comp. Gen. 307 (1975), 75-2 CPD 203.

The Brooks Act generally authorizes and directs GSA to coordinate and provide for the economic and efficient purchase, lease and maintenance of ADPE by Federal agencies. GSA has implemented the Brooks Act insofar as it covers the direct procurement of all ADPE, software, maintenance services and supplies by Federal agencies in 41 C.F.R. subpart 101-32.4 (1976). This subpart generally provides that agencies have no authority to procure ADPE except under a proper DPA from GSA. It also sets forth procedures to be followed in ADPE procurements under the delegated authority.

E-Systems contends that the DPA was issued in violation of the Brooks Act since GSA cannot delegate its authority to a Federal agency to procure mass-produced, commercially available ADPE components and there is no evidence that the Administrator of GSA found that the procurement was necessary for economy and efficiency of operations.

In 51 Comp. Gen. 457, 460, 461 (1972), while addressing the validity of a DPA by GSA to the Department of the Army, we stated:

"The purpose of Public Law 89-306, supra, was to amend the Federal Property and Administrative Services Act of 1949, 63 Stat. 378, June 30, 1949, so as to establish the authority and provide the operational machinery needed for the effective and efficient management of

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automatic data processing equipment (ADPE). See U.S. Code Cong. & Ad. News (1965), page 3859; 48 Comp. Gen. 462 (1969). In accordance with this purpose, GSA was authorized, inter alia, to coordinate and provide for the economic and efficient purchase of such equipment by Federal agencies. 40 U.S.C. 759(a). It was further empowered to delegate to Federal agencies the authority to purchase ADPE systems or specific units of such equipment. 40 U.S.C. 759(b)(2). Any contention that GSA cannot delegate its purchase authority is, therefore, plainly refuted by the clear language of the statute."

Title 40 U.S.C. § 759(b)(2) (1970) allows GSA to delegate procurement authority to agencies to acquire ADPE when GSA determines it is "necessary for the economy and efficiency of operations" or "essential to national defense or national security." See H. Rep. No. 802, 89th Cong., 1st Sess. 39 (1965), and S. Rep. No. 938, 89th Cong., 1st Sess. 39 (1965). Further, this section provides for GSA to delegate procurement authority when it is necessary or desirable to allow for the orderly implementation of a program for the utilization of ADPE. Our Office has consistently recognized the authority of GSA to delegate its procurement authority under the foregoing standards. See 47 Comp. Gen. 275, 278 (1967); 48 id. 462, 464 (1969); 51 id., supra; PRC Computer Center, Inc., 55 id. 10 (1975), 75-2 CPD 35.

By letter dated April 14, 1976, B-115369, to the Attorney General, we stated that the widespread delegation of procurement authority is necessary because of GSA's lack of resources due to the failure to fully implement the Brooks Act as Congress intended. It was our view that delegations of procurement authority after the full implementation of the single purchaser concept (GSA becoming the single purchaser of ADPE for the Government) would be the exception rather than the rule and, as such, should be specifically justified by GSA on a case-by-case basis.

E-Systems contends that there is no evidence that the Administrator of GSA made a determination of economy and efficiency of operations when the DPA was issued. We agree, however, according to GSA, the DPA was issued on the basis that

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such action was necessary and desirable to allow for the orderly implementation of a program for the utilization of ADPE. As mentioned above, our Office has consistently recognized the authority of GSA to delegate its procurement authority under this latter standard provided for in 40 U.S.C. § 759(f)(2) (1970). Further, our Office held in PRC Computer Center, Inc., supra, that an agency is entitled to rely on authorizations to proceed with a procurement for ADPE given by GSA after the solicitation has been reviewed. An agency should be entitled to rely on the authorization for a procurement issued by GSA.

In view of this discussion, there is no need to consider protest point (1)(c) above.

E-Systems contends that the Keronix IDS-16 minicomputer offered by AFC is not compatible with the AFOS hardware specifications. All the AFOS minicomputers were required to have 14 common hardware features. E-Systems claims a vector interrupt system and a writable control store which are required by the specifications are critically absent from the Keronix IDS-16 minicomputer.

The record indicates that the minicomputer offered by AFC was fully evaluated by technical computer experts who were members of the AFOS source evaluation board's technical committee. After careful consideration, the technical experts concluded that the minicomputer proposed by AFC was fully compliant with all AFOS specifications.

Our ADPE staff has reviewed AFC's proposal and has concluded that the Keronix IDS-16 minicomputer does include the vector interrupt system and the writable control store. Therefore, this aspect of the protest is denied. By letter dated October 15, 1976, E-Systems informed our Office that Keronix failed to deliver the minicomputers to the prime contractor and the latter had requested permission to substitute another computer subcontractor. Therefore, according to E-Systems, its protest on this point was substantiated. Of course, without more, this, in and of itself, would not substantiate the protest. In any event, this is a matter which pertains to contract administration which is the function and responsibility of the contracting agency. Matters of contract administration are not for resolution under our bid protest procedures which are reserved for considering whether an award, or proposed award, of a contract.

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complies with statutory, regulatory and other legal requirements. See Inter-Alloys Corporation, B-182890, February 4, 1975, 75-1 CPD 79.

E-Systems contends that DOC conducted negotiations with AFC in December 1975, while not affording this opportunity to other offerors within the competitive range.

This same contention was raised by the General Electric Company (GE), another offeror in the competitive range, in an earlier protest to our Office involving the same procurement. On March 22, 1976, counsel for GE instituted Civil Action No. 76-0473 in the United States District Court of the District of Columbia (General Electric Company v. Elliot L. Richardson, et al.) raising this same issue. The complaint requested a preliminary injunction restraining the defendants from taking any further action or implementing in any way the award to defendant AFC. On April 16, 1976, an order was entered denying the plaintiff's motion for preliminary injunction. Subsequently, the Government filed a motion to dismiss or, in the alternative, for summary judgment. This was heard on June 14, 1976, and by order filed on June 15, 1976, the motion for summary judgment was granted. The court stated, inter alia, in its order:

"* * * and it appearing to the court that the award of the Government procurement contract challenged herein was not arbitrary, capricious or contrary to law and that there was a rational basis for the agency's decision, (M. Steintal & Co. v. Seaman, 455 F. 2d 1289 (D.C. Cir 1974) * * *."

It is our policy not to render a decision on a protest where the same issues are either pending before a court of competent jurisdiction or have already been decided by such a court. Even though E-Systems was not a party to the litigation, a decision will not be rendered on this aspect of the protest since the court's action would take precedence and our Office could not recommend remedial action. Therefore, our policy of refusing to rule on a protest where the matter involved is the subject of litigation would also apply with respect to E-Systems' protest. See Nartron Corp.; DC Electronics, Inc., 53 Comp. Gen. 730 (1974), 74-1 CPD 154.

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In view of the foregoing, the protest is denied.

R. F. K. 1/14
Deputy Comptroller General
of the United States